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IN THE

Supreme Court of the United States

October Term, 1965
No. 325

ROY WRIGHT DE WELLES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petitioner's Reply to Brief for the United States in Opposition.

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1. Respondent is in error in its assertion (p. 10) that "the objects seized were 'the things used to carry on the criminal enterprise' . . . and were, therefore, subject to seizure at the time of arrest."

In the first place, it must be remembered that the charge upon which petitioner was tried was violation of 18 U.S.C. 1341 (mail fraud) [C. T. 4-9; Deft. Appx. 2-6]. The elements of that offense are (1) the formation of a scheme with intent to defraud, and (2) the use of the mails in furtherance of that scheme (*United States v. Shavin,* 287 F. 2d 647, 649 [CA 7 1961]; *Webb v. United States,* 191 F. 2d 512, 514 [CA 10 1951]; *Krueter v. United States,* 218 F. 2d 532, 533 [CA 5 1955], cert. den. 349 U.S. 932).

The objects seized and admitted into evidence (see footnote 2, p. 9 of Petition) can hardly be said to be the means of carrying on the criminal enterprise charged. At most, they are evidentiary; hence not seizable. (*Harris v. United States,* 331 U.S. 145, 154).

Even if it be considered that the ambiguity in the record amounts to an arrest for some state crime as to which petitioner was not tried, such as practicing chiropractic without a license, the items seized (*e.g.* photographs [Exs. 51-53, 55-56, R. T. 289], Technical Manual Explaining How to Use the Detoxacolon [Ex. 5, R. T. 20], appointment book [Ex. 16, R. T. 60], checks [Exs. 62 and 66, R. T. 402 and 470]) are certainly not the "means" or "instrumentalities" of the crime. At most, they are again only evidentiary and therefore not seizable.[1]

Respondent concedes (p. 10, f.n. 8) that the search conducted after petitioner left, or was taken from, the office was illegal and that any objects then taken were inadmissible. Respondent is in error, however, in its assertion (*ibid*) that the record does not show that any of those "additional things" were admitted at trial. The Chief of Police testified precisely to what he took from the offices at the time the arrests were made [R. T.

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[1]As to some of the items seized, set out in footnote 2, page 9 of the Petition for Writ of Certiorari, petitioner's counsel at first made no objection. This was because, due to the insufficient time for counsel to prepare for trial, petitioner's counsel thought the police officers had a search warrant [R. T. 240]; so also did the Court [*ibid*]. Immediately upon his being apprized of the true facts [*ibid*], counsel argued that all the evidence seized at the office was not admissible [*ibid*: R. T. 244, 246, 270], and moved for a mistrial based thereon [R. T. 274]. The Court overruled the motion [R. T. 275]. It also overruled defendant's motion at the close of the Government's case based upon the illegal seizure [R. T. 472, 477].

278]: "I took several articles, x-rays, x-ray film. I took an appointment book and a book on the machine that was being used in the office."[2] But there were other "additional things" taken from the office which were admitted into evidence and which, in the light of the Chief of Police's testimony could only have been seized during and as a result of Captain Kelley's search in the absence of defendant. For example, case history cards [Exs. 18-30; R. T. 101-102]; checks [Exs. 62 and 66, R. T. 402, 405, 427, 429]; chart relating to use of Detoxacolon [Ex. 4; R. T. 20] sales kit [Ex. 3, R. T. 18]; pamphlet "Let's Live" [Ex. 68; R. T. 613, 615].

2. Respondent asserts (Br. 10) as justification for the trial court's order denying the continuance to petitioner's on-the-eve-of-trial counsel, "petitioner's apparent disinclination to be examined by the court-designated physician." This assertion is most unfair and is contrary to the record. The fact is that petitioner, who was in the hospital on October 3, 1963 [C. T. 34] the date he was to have been examined by Dr. Stewart [C. T. 25], did not know of the order which had been made, until October 25, 1963 when he received a letter from his former attorney advising him of the Court order for examination on October 3rd [C. T. 32]. As soon as he received this letter, he contacted Dr. Stewart who advised him that the papers had been returned to Indianapolis and that there was no need to appear for a physicial examination [C. T. 32].

The picture presented by the record in this case is one of an accused in a criminal proceeding having been

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[2]He also testified [R. T. 286] that he had photographs taken which were also admitted into evidence [Exs. 51-56; R. T. 289].

denied, through no fault of his own—illness can strike anyone—a fair trial through lack of an opportunity to prepare and to be adequately represented by counsel.

Conclusion.

The petition for writ of certioari should be granted.

Respectfully submitted,

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